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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

APR 19 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Tariff Filing Requirements for ) CC Docket No. 93-36  
Nondominant Common Carriers )

REPLY COMMENTS OF CITICORP

Citicorp, by its attorneys, hereby replies to the comments that were filed in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding on March 29, 1993.<sup>1</sup>

I. INTRODUCTION AND SUMMARY OF POSITION

Citicorp is a major user of communications services provided by dominant and nondominant common carriers. Like other large users, Citicorp has benefited from increased competition in the interexchange communications marketplace and has entered into individually negotiated long-term contracts and service arrangements with both dominant and nondominant carriers. Citicorp has decided to participate in this proceeding because it shares -- and wishes to emphasize -- the concerns expressed by other users about the effect on these contractual arrangements of the Commission's

<sup>1/</sup> See Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, FCC 93-103 (released Feb. 19, 1993) [hereinafter "Notice"].

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proposal to reduce the notice period for nondominant carrier tariff filings from two weeks to one day.<sup>2</sup>

As the Commission acknowledged in its Notice, and as numerous commenters have agreed, a one-day notice period "would effectively eliminate pre-effective tariff review."<sup>3</sup> The absence of such review poses a potential problem for Citicorp and other users that have contractual arrangements with nondominant carriers, because of the so-called tariff precedence doctrine, under which tariffs take precedence over the conflicting terms of contracts. By filing tariffs that are inconsistent with the terms and conditions of their contracts with users, nondominant common carriers could -- under the Commission's proposed rules -- unilaterally change or abrogate these contracts virtually without notice.

The one-day notice period proposed by the Notice thus has the potential to jeopardize the stability of contracts that Citicorp and other users have in good faith entered with nondominant carriers. Citicorp therefore joins those commenting parties that have advocated changes in the Commission's proposed rules. These changes would require a nondominant common carrier to warrant and represent to the

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2/ Id. at ¶ 15.

3/ Id. at ¶ 18; see, e.g., Comments of Capital Cities/ABC, Inc. and National Broadcasting Company, Inc., CC Docket No. 93-36, at 2 (filed Mar. 29, 1993) [hereinafter "Network Comments"]. (Unless otherwise indicated, all comments cited herein were filed in CC Docket No. 93-36 on March 29, 1993.)

Commission that a tariff filing does not materially alter any of its existing contractual obligations or long-term service plans or, if it does, that the carrier has obtained the consent of all affected customers.

Where a carrier cannot so warrant and represent, Citicorp supports changes in the Commission's proposed rules that would provide customers with a realistic opportunity to review and challenge any carrier attempts to walk away from their contractual obligations. In this regard, Citicorp also supports those parties that have asked the Commission to apply a stricter standard of review in evaluating carrier tariffs that are inconsistent with their contractual obligations and that have not been agreed to by users.

II. THE COMMENTS DEMONSTRATE THE NEED FOR COMMISSION ACTION TO ENSURE THAT STREAMLINED TARIFF REGULATION DOES NOT ENHANCE THE ABILITY OF NONDOMINANT CARRIERS TO ABROGATE THEIR CONTRACTUAL ARRANGEMENTS WITH USERS.

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The streamlined tariff filing requirements proposed by the Notice are -- standing alone -- a legitimate response to the recent decision of the U.S. Court of Appeals which invalidated the Commission's permissive detariffing policy.<sup>4</sup> In the Notice, the Commission has proposed to reduce the notice period for tariffs filed by nondominant carriers from two weeks to one day.<sup>5</sup> As numerous parties have pointed

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<sup>4/</sup> See American Telephone & Telegraph Co. v. FCC, 978 F.2d 727, 736 (D.C. Cir. 1992), rehearing en banc denied, Jan. 21, 1993.

<sup>5/</sup> See Notice at ¶ 15.

out, however, the Commission's proposal could potentially have a significant adverse and presumably unintended impact on users with contractual arrangements with nondominant carriers.<sup>6</sup> The problem is not with the Commission's proposal, which Citicorp generally supports, but rather with the combined impact of a one-day notice period and the tariff precedence doctrine, under which a carrier may unilaterally change the rates, terms and conditions of a contract simply by filing a tariff inconsistent with that contract.<sup>7</sup>

Simply stated, a one-day notice period could potentially deprive users of the opportunity to become aware of, much less review, a carrier tariff filing that is inconsistent with the terms of a pre-existing contract.<sup>8</sup> Rather than helping users, a one-day notice period could place users at the mercy of nondominant carriers, which -- without notice -- could raise rates, change important terms

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6/ See Comments of Aeronautical Radio, Inc. at 3-6 [hereinafter "ARINC Comments"]; Comments of Telecom Services Group, Inc. at 3; Comments of Telecommunications Association at 2-3 [hereinafter "TCA Comments"]; Network Comments at 3-5; Comments of Ad Hoc Telecommunications Users Committee at 4-5 [hereinafter "Ad Hoc Comments"]; Comments of International Communications Association at 2 [hereinafter "ICA Comments"].

7/ See American Broadcasting Cos. v. FCC, 643 F.2d 818 (D.C. Cir. 1980) (tariff revisions which are allowed to become effective supersede conflicting provisions in unfiled carrier-customer contracts for same service).

8/ See Network Comments at 4-5.

and conditions, or completely abrogate a contract simply by filing an inconsistent tariff revision. Thus, instead of minimizing the economic burdens of regulation, shortening the notice period could -- without more -- actually increase them. Among other things, shortening the notice period could increase marketplace uncertainty and make planning, budgeting and other financial decisions more difficult and time consuming; it could also needlessly consume time and resources -- which tariffs are supposed to eliminate -- as users and carriers struggle to find mutually satisfactory ways of minimizing their risks.<sup>9</sup> Plainly, this cannot be what the Commission intended.

As several parties have pointed out, there are a number of steps which the Commission can take -- without unduly burdening the carriers -- to ensure that users are protected in a streamlined tariff filing environment. First, the Commission can require nondominant common carriers, as the Ad Hoc Telecommunications Users Committee and the International Communications Association have suggested, to warrant and represent that a tariff filing does not adversely affect, in a material way, the contractual rights of customers or, if it does, that the

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9/ See TCA Comments at 5-6; ARINC Comments at 5-6.

carrier has obtained the consent of all affected customers to the proposed change.<sup>10</sup>

Where a carrier is unable or unwilling to make such warranties and representations, the Commission should, as several parties have suggested, automatically suspend and investigate the carrier's tariff revisions.<sup>11</sup> Under these circumstances, such automatic suspension and investigation would plainly be warranted. As one commenting party has explained:

In the more competitive environment upon which the Commission's policies regarding nondominant carriers are premised, it is difficult to imagine the basis upon which the Commission would find that a tariff proposing to abrogate or alter the terms of a long-term service arrangement does not warrant suspension and investigation.<sup>12</sup>

Mere suspension and investigation, however, are not adequate to protect users from unilateral action on the part of the carriers. Citicorp therefore supports those parties that have proposed a stricter standard of review for carrier

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<sup>10/</sup> See Ad Hoc Comments at 8; see also ICA Comments at 2. Citicorp also supports Ad Hoc's proposal that "the Commission expressly state that the making of . . . false certifications is an unreasonable practice under Section 201(b) of the Communications Act, and that accordingly customers injured by such a false certification, in that their long-term arrangement[s] have been unilaterally altered . . . have the right under Sections 206 and 207 of the Act to recover from the carrier any damages they may incur." Ad Hoc Comments at 8.

<sup>11/</sup> See Network Comments at 5-6; TCA Comments at 8; ARINC Comments at 7; Ad Hoc Comments at 11; ICA Comments at 2-3.

<sup>12/</sup> Network Comments at 5-6.

tariffs that are inconsistent with an underlying contract and that have not been accepted by users. The need for such a more demanding standard is clear.

At present, the Commission allows carrier tariffs that are inconsistent with an underlying contract to take effect, even if users object, if the carrier can demonstrate "substantial cause" for the inconsistency.<sup>13</sup> That burden, however, has not been difficult for the carriers to satisfy. As Aeronautical Radio, Inc. ("ARINC") and the Telecommunications Association ("TCA") have noted, the Commission has found "substantial cause" for tariff revisions in a host of circumstances, including those where a rate increase stems from such "unforeseen" events as inflation and increased competition.<sup>14</sup>

Citicorp therefore endorses the arguments of those parties that have urged the Commission to put teeth into the "substantial cause" test and to require a "compelling demonstration"<sup>15</sup> that increased rates or modified terms and conditions are just and reasonable. Towards this end, Citicorp endorses the position, advocated by ARINC and TCA, that the Commission find inconsistent tariff filings to be

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<sup>13/</sup> See RCA American Communications, 84 F.C.C.2d 353 (1980), on reconsideration, 86 F.C.C.2d 1197 (1981), on remand, 94 F.C.C.2d 1338 (1983), aff'd sub nom., RCA v. FCC, 731 F.2d 996 (D.C. Cir. 1984).

<sup>14/</sup> See ARINC Comments at 3-4; TCA Comments at 4.

<sup>15/</sup> ARINC Comments at 7; TCA Comments at 8.

lawful only in "rare circumstances, if any."<sup>16</sup> Such a standard will make it significantly more difficult for carriers to exploit unfairly the precedence of tariffs over contracts.<sup>17</sup>

Finally, Citicorp joins those parties that have urged the Commission to provide users with the right to terminate service without liability if a tariff filing that is inconsistent with an underlying contract is allowed to take effect, notwithstanding any tariff or contractual provision to the contrary.<sup>18</sup> If the carriers are able to benefit from the vagaries of the administrative process, so too should users.

### III. CONCLUSION

As set forth above and in the initial comments filed in this proceeding, the Commission should require nondominant common carriers to warrant and represent that a tariff filing is not inconsistent with the terms and conditions of any underlying contract or long-term service

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<sup>16/</sup> ARINC Comments at 7; TCA Comments at 8; Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6852 n.400 (1990).

<sup>17/</sup> Citicorp also agrees with those commenters that have asked the Commission to declare unlawful, pursuant to Sections 201(b) and 205 of the Communications Act, any tariff filing that unilaterally seeks to abrogate commitments made in tariffs not to modify rates, terms and conditions. See ARINC Comments at 7; TCA Comments



plan or, if it is, that the carrier has obtained the consent of all affected customers. Absent such warranties, the Commission should provide customers of nondominant common carriers with the ability to review and challenge tariffs that are inconsistent with pre-existing carrier-customer contracts. The Commission should also employ a stricter standard of review in evaluating tariff filings that are inconsistent with existing contracts, and should provide users with the ability to terminate service without liability if an inconsistent tariff filing is allowed to go into effect.

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April 19, 1993

CERTIFICATE OF SERVICE

I, Joyce Fleming, hereby certify that copies of the foregoing Reply Comments of Citicorp were served by hand or by First-Class United States mail, postage prepaid, upon the parties appearing on the attached service list this 19th day of April, 1993.

  
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